INDEX

CASES CITED

STATUTES AND REGULATION

LEGISLATIVE REPORTS

TREATISES AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 80

JOSEPH SHERMAN, *Petitioner*,

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the three-judge panel which first decided the case (R. 83-95), holding that the deportation order should be set aside, is reported in 350 F.2d 894. The opinion of the court en banc affirming the deportation order on the government's petition for rehearing (R. 96) is reported in 350 F.2d 901.

JURISDICTION

The judgment of the court below (R. 97) is dated and was entered on January 18, 1966. The petition for certiorari was filed on March 3, 1966, and was granted on

April 18, 1966 (R. 98). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 106(a) of the Immigration and Nationality Act, added by 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a), provides in part as follows:

> "Judicial Review of Orders of Deportation and and Exclusion
>
> "Sec. 106.(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that —
>
> "(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.
>
> * * * * *
>
> "(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive;"

§ 242(b) of the Immigration and Nationality Act, 66 Stat. 209 (1952), 8 U.S.C. § 1252(b), provides in part as follows:

> "(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make

determinations, including orders of deportation.... Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that —

* * * * *

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

QUESTION PRESENTED

In a deportation proceeding against a long-time resident alien, must the government prove the facts on which deportability depends by more than a bare preponderance of the evidence?

STATEMENT OF THE CASE

Joseph Sherman, the petitioner, was born in Poland in 1906. In 1920, aged 14, he entered the United States in the company of his mother and three sisters and was admitted for permanent residence. (R. 64-65, 74, 84.)

On March 14, 1963, the Immigration and Naturalization Service instituted deportation proceedings against petitioner, alleging that on December 20, 1938, he had reentered the United States without inspection and was therefore deportable under § 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (R. 1).

It was the Service's theory at the administrative hearing that petitioner had left the United States in June 1937, in order to fight on the loyalist side in the Spanish civil war, and had returned to the United States in December 1938, bearing a passport issued under the name of Samuel Levine (R. 74-76, 84).

The Service introduced evidence that in June 1937, petitioner applied for and received a United States pass-

port under the name of Samuel Levine. It was established that someone traveled to Europe on this passport in June 1937, aboard the SS Acquitania, and that someone entered the United States on this passport on December 20, 1938, aboard the SS Ausonia. There was no evidence identifying petitioner as the individual or individuals who had utilized the passport. (R. 75, 85.)

The only evidence that petitioner had ever left the United States was the testimony of Edward Morrow, given in February and June 1964, twenty-seven years after the events to which it pertained (R. 85-86, 13, 17, 39, 49, 75-76).

Morrow had served with the loyalist forces in Spain in 1937 and 1938. He had left the United States in June 1937 aboard the SS Acquitania and had returned in December 1938 aboard the SS Ausonia. (R. 17-19, 70, 81.)

In April 1963, an investigator for the Immigration and Naturalization Service showed Morrow the passport photograph (and its enlargement) of "Samuel Levine." Morrow told the investigator "that the person represented thereon appears vaguely familiar to him and believes he may have been on the 'Acquitania' sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the SS 'Acquitania' trip abroad in June 1937 or on the SS 'Ausonia' return voyage in December 1938, with him, he stated that he could not recognize the name. When furnished additional background data regarding the subject, he again advised that he could not tie it in with the person represented by the photograph." (R. 82, 40-46.)

On February 25, 1964, just before testifying at the administrative hearing, Morrow was placed by a Service investigator where he could secretly observe petitioner. After conducting this observation of petitioner for about

half an hour, Morrow advised the investigator that he recognized petitioner, whereupon the Service decided to utilize Morrow as a witness. (R. 46-47, 60, 76.)

Morrow then testified that he had seen petitioner about 20 times in Spain and that petitioner had been in the Transportation Corps there (R. 18, 35, 62). Morrow could not identify any particular occasion on which he had seen petitioner in Spain (R. 18-19), admitted that petitioner had not been in his unit (R. 61), and could not recall having had any "personal" or "direct" contact or conversation with petitioner (R. 18, 26, 32) or having ever been introduced to him (R. 38).

Directly reversing his pre-hearing statement to the Service, Morrow testified that he did not know whether petitioner had travelled to Spain with him, but that petitioner had been with him on the SS Ausonia on the return voyage to the United States (R. 19).

Morrow admitted that it was possible that his identification of petitioner was mistaken (R. 61). When asked whether he was positive that he had seen petitioner in Spain, he answered, "Positive — No. But I feel I saw this man in Spain" (R. 62).

The Special Inquiry Officer, ruling that the "collateral discrepancies and contradictions" in Morrow's testimony "create an aurora of credibility and reliability to the witness' testimony as a whole" (R. 71), sustained the charge against petitioner and ordered his deportation (R. 72). The Board of Immigration Appeals affirmed (R. 81).

On review by the Second Circuit, the case was first heard by a three-judge panel consisting of Circuit Judges Waterman, Friendly and Smith. On September 22, 1965, the panel, Judge Friendly dissenting, issued a decision setting aside the deportation order and remanding the case to the Immigration and Naturalization Service. (R. 83-95.) The majority held that in deportation cases against long-time resident aliens the government has a

"higher burden of persuasion" (R. 90) than the ordinary civil rule that "the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of the evidence" (R. 89). The majority ruled that the government's burden in such cases is to prove its case "beyond a reasonable doubt" (R. 92), and remanded for administrative reconsideration on that basis.

Judge Friendly dissented on the ground that §§ 242(b) and 106(a)(4) of the Immigration and Nationality Act establish "reasonable, substantial and probative evidence" as the standard of proof in deportation cases (R. 93-95).

The government moved for a rehearing en banc. The motion was granted, and the en banc court, Judges Waterman and Smith dissenting, sustained the deportation order for the reasons stated in Judge Friendly's dissenting opinion. (R. 96.)

SUMMARY OF ARGUMENT

A.

In proceedings to expel a resident alien, the burden of proof is on the Immigration and Naturalization Service. The burden is defined by the Board of Immigration Appeals as that of proving deportability by a preponderance of reasonable, substantial and probative evidence. This was the standard by which petitioner was found deportable.

B.

Four possible standards of proof were mentioned in the opinions below. Under Judge Friendly's view, the standard is simply "reasonable, substantial and probative evidence." This relieves the Service of carrying the burden of proof. The other possible standards are preponderance of the evidence, proof beyond a reasonable doubt, or "clear, unequivocal and convincing evidence."

The differences in the standards are not academic.

C.

Contrary to Judge Friendly's opinion, §§ 106(a)(4) and 242(b)(4) of the Immigration and Nationality Act do not establish the standard of proof required in the administrative hearing. As appears from their text and legislative history, the sections merely enact the substantial evidence rule for the purposes of judicial review. Moreover, § 242(b)(4) relates to the quality of the evidence in support of deportability and not to the degree of persuasion engendered by the evidence on both sides.

Accordingly, the Court is free to exercise the traditional judicial function of devising an appropriate standard of proof.

D.

A higher standard than preponderance of evidence, preferably the criminal standard, should apply in all deportation cases involving resident aliens who have been admitted for permanent residence.

In denaturalization and expatriation cases, the Court requires compliance with the "clear and convincing evidence" standard because such cases seek to revoke a "once conferred," "precious" right. The same rationale applies to deportation cases against resident aliens, and the facts of recent deportation cases indicate that the Court has applied such a standard.

It would be even more appropriate to require compliance with the criminal standard of proof beyond a reasonable doubt. This is because deportation of resident aliens is penal in its consequences, in the grounds for deportation, and in the procedures by which deportation is effected.

E.

Since the administrative agency applied an erroneous principle of law in reaching its decision, the judgment

below must be reversed. However, the proper course is to direct termination of the deportation proceedings, rather than administrative reconsideration, because the evidence plainly does not satisfy the appropriate standard of proof.

The case against petitioner, a long-resident alien, depends on an uncertain, vague and belated identification by a witness testifying to casual encounters of 27 years before, in a manner seriously inconsistent with his prior statement to the Service. This testimony is not "reasonable, substantial and probative evidence." By no possibility can it satisfy either the standard of proof beyond a reasonable doubt or the "clear, unequivocal and convincing" standard.

ARGUMENT

The administrative decision that petitioner is deportable was made by applying an erroneous standard of proof. Under the correct standard, deportability has not been proved.

A. Petitioner was found deportable by a preponderance of the evidence.

When the government seeks to expel a resident alien, the burden of proving the facts establishing his deportability is on the Immigration and Naturalization Service. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153; *Chew v. Rogers*, 257 F.2d 606 (D.C. Cir.); *Ben Huie v. Immigration & Naturalization Service*, 349 F.2d 1014, 1017 (9th Cir.); *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir.); *Tutrone v. Shaughnessy*, 160 F. Supp. 433, 438 (S.D. N.Y.). That the burden of proving deportability is on the Service is also clearly implied by § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, which finds it necessary to provide expressly that in deportation proceedings the burden of proof is on the alien to show the time, place and manner of his entry into the United States. The gov-

ernment concedes petitioner's lawful entry in 1920, and acknowledges that the burden of proving the charge of entry without inspection in 1938 was properly on the government. See government's Opposition to the petition for certiorari, p. 6, fn. 5. Both the special inquiry officer (R. 67) and the Board of Immigration Appeals (R. 74) recognized that the Service had the burden of proving petitioner's deportability.

The extent of the Service's burden is defined by the Board of Immigration Appeals as follows: "Ordinarily in deportation proceedings, the Service must establish its case by a preponderance of reasonable, substantial and probative evidence." *Matter of H*, 3 I & N Dec. 441, 449. See also *Matter of Peralta*, 10 I & N Dec. 43, 46; *Matter of V*, 7 I & N Dec. 460, 463. We do not understand the government to dispute that this preponderance standard was employed here as a matter of course by the Board of Immigration Appeals, the ultimate finder of the facts in the administrative proceeding. [1] Moreover, as we later show, the evidence of deportability does not satisfy a higher standard than that of preponderance.

B. *The possible standards of proof.*

The question here is whether, in the administrative proceeding against petitioner, a long-time resident alien, the Service was obliged to prove its case by more than a preponderance of the evidence. This question does not directly concern the nature or scope of judicial review, although that may be affected by the rule governing the necessary quantum of proof in the administrative proceeding.

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[1] The initial fact-finder, the special inquiry officer, ruled that "the burden of establishing deportability by reasonable, substantial and probative evidence is on the Government" (R. 67). If he meant by this a different standard of proof than that applied by the Board, which we doubt, it was nevertheless incorrect for reasons later stated.

Four possible standards of proof were mentioned in the opinions below, and it is desirable to examine these before considering which is the correct standard.

Judge Waterman's opinion held (R. 92) that in cases involving long-time resident aliens the criminal standard of proof applies so that the Service must prove deportability "beyond a reasonable doubt."

Judge Friendly, whose dissenting opinion was eventually adopted by the majority of the en banc court (R. 96), stated (R. 93), "If the slate were clean, I might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail." Judge Friendly held (R. 95), however, that Congress had established a statutory standard of "reasonable, substantial and probative evidence" which "applies in all deportation cases - both to the Service and to the courts."

Judge Friendly's view relieves the Service from carrying any burden of proof; the Service may prevail so long as it produces substantial evidence of deportability, even if its case is outweighed by substantial evidence to the contrary.

The preponderance of evidence standard is satisfied by "just more than an even balance of the evidence." *Matter of V*, 7 I & N Dec. 460, 463. It requires merely that the evidence on one side be more convincing to the trier of fact than the contrary evidence. McCormick, Evidence (1954) § 319. Of course, the evidence of deportability must also be "substantial," but this requirement "is something less than the weight of the evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620.

To meet the preponderance of evidence standard, the burden is to show that the claimed fact is "more proba-

bly true than false." Under the "clear and convincing" standard, the claimed fact must be "highly probably" true Under the criminal standard, the claimed fact must be "almost certainly" true. McBaine, *Burden of Proof: Degrees of Belief,* 32 Calif. L. Rev. 242, 246-47, 253-54, 258, 261-62, 265 (1944).

These distinctions are not academic. Thus in cases in which the "clear, unequivocal and convincing" standard is applicable, the Court has reversed for insufficiency of evidence judgments supported by a preponderance of the evidence. *Lalone v. United States,* 164 U.S. 255; *Schneiderman v. United States,* 320 U.S. 118; *Nowak v. United States,* 356 U.S. 660; *Chaunt v. United States,* 364 U.S. 350; *Nishikawa v. Dulles,* 356 U.S. 129.

In what follows, we will first show that, contrary to Judge Friendly, Congress has not provided a statutory standard for the burden of proof and that the Court is free to fashion an appropriate standard. We will next show why the Court should adopt a higher standard in cases of resident aliens than that of preponderance of the evidence, preferably the criminal standard. Finally, we will show that the evidence in this case does not meet a higher standard than preponderance, so that the proper remedy is to direct a termination of the deportation proceedings rather than a remand for administrative reconsideration.

C. The standard of proof in deportation cases has not been prescribed by Congress, and the Court is free to adopt an appropriate standard.

Judge Friendly's opinion holds that §§ 106(a)(4) and 242(b)(4) of the Immigration and Nationality Act, quoted *supra,* pp. 2-3, enact the standard of proof for deportation cases, and that this standard, which merely requires "reasonable, substantial and probative evidence," applies "both to the Service and to the courts" (R. 95). The holding is incorrect.

For reasons we later state, and as unanimously noted by commentators on this case,[2] the sections merely state a standard for judicial review. They do not define the standard of proof required in the administrative hearing. In fact, the sections do not even say on whom the burden of proof is located in the administrative proceeding. If Judge Friendly is right, then, contrary to universal belief, including that of the government (*supra*, pp. 8-9), the special inquiry officer and the Board may place the burden of proving non-deportability on the alien. And even if the alien carries this burden, he may still be ordered deported so long as there is substantial evidence of deportability.

Nor is it possible to deduce from the reviewing standard the standard of proof at the evidentiary hearing, much less to assume that the two are the same. In criminal cases the usual standard of appellate review requires the jury's verdict to stand if supported by substantial evidence. *Rutkin v. United States*, 343 U.S. 130, 135; *Stilson v. United States*, 250 U.S. 583, 588; *United States v. Tutino*, 269 F.2d 488, 490 (2d Cir.). It has never been thought that these holdings are inconsistent with the rule that in a criminal trial guilt must be proven beyond a reasonable doubt. As Professor Jaffe has pointed out, Judge Friendly's view erroneously "merges the function of factfinder with that of reviewing court; it argues that the factfinder is to find for the Government if he concludes that this finding should not be reversed by a court. But that is not the task of the factfinder, nor is it the attitude that he is to take toward his task." *Op. cit. supra*, at 915.

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[2] Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914, 915 (1966); Note, *Standard of Proof in Deportation Proceedings*, 18 Stan. L. Rev. 1237, 1238-40 (1966); Comment, 41 N.Y.U. L. Rev. 622, 623 (1966).

It is crystal clear from text and context that § 106(a)(4) is exclusively addressed to judicial review. § 106 was added to the Act in September 1961, 75 Stat. 651, in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H. Rep. 1086, 87th Cong., 1st Sess., 2 U.S.C. Cong. & Adm. News (1961) 2950, 2968. The section is entitled "Judicial Review of Orders of Deportation and Exclusion"; it expressly provides "the sole and exclusive procedure for, the judicial review of all final orders of deportation"; and subsection (a)(4) is a directive for court determination of a petition for judicial review filed under section 106.

§ 242(b)(4) is also addressed to judicial review. Its language is apt for that purpose only, since it speaks of the validity of an already-rendered decision of deportability. The language thus contrasts with that of section 349(c), added by 75 Stat. 656 (1961), 8 U.S.C. § 1481(c), which expressly provides that a party claiming loss of nationality must establish the claim "by a preponderance of the evidence."

The legislative history of § 242(b)(4) conclusively demonstrates that the section establishes a review standard only. The Senate Report on the bill which became the Immigration and Nationality Act states (S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 30):

> "The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that of the administrative body."

The House Report (H. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 57, 2 U.S.C. Cong. & Adm. News (1952) 1653, 1712) contains substantially identical language, which is

quoted in Judge Friendly's opinion. It is inexplicable that the passage can be regarded as anything but a directive to an "appellate body."

Moreover, § 242(b)(4) refers merely to the quality of the evidence which may be considered to support deportability, and not to the degree of persuasion which the evidence on both sides engenders. This distinction was recognized by the Board of Immigration Appeals in *Matter of V*, 7 I & N Dec. 460, 463:

> "Finally, it is important to bear in mind the distinction between the burden of proof and the quality of the evidence which is required to establish that burden successfully. It is to be noted that subsection (b)(4) of section 242 of the act does not speak of the burden of proof but of the quality of the evidence which the Service must produce before deportability can validly be found. Insofar as deportation of aliens is concerned, the act does not speak in specific terms of the burden of establishing deportability in the general case. That the burden of establishing alienage and establishing that a *prima facie* case of deportability is upon the Service is settled by judicial interpretation. . . ."

The language of § 242(b)(4), the intention manifested in the Senate and House Reports, and the administrative construction of the Board of Immigration Appeals, cannot be overcome by the fact that the section appears among provisions regulating proceedings before special inquiry officers and that it directs the Attorney General on the formulation of regulations. These circumstances may readily be attributed to the inept draftsmanship which characterizes the Act.[3]

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[3] The Act "is badly drafted, confusing and in some respects unworkable." *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) 263.

Judge Waterman stated (R. 88) that "even though Section 242 (b) appears in a section of the Act prescribing agency procedures, it is best understood as a restatement of the proper

D. The Service is required to prove the deportability of petitioner, a long-resident alien, by more than a preponderance of the evidence.

In the absence of statute, the standard of proof in civil proceedings has traditionally been judicially determined. Preponderance of the evidence is the usual civil standard, but more rigorous tests, including "clear and convincing" and "beyond a reasonable doubt," are frequently applied. McCormick, Evidence (1954) § 320; 9 Wigmore, Evidence (3d ed.) § 2498. Thus this Court requires satisfaction of the "clear, unequivocal and convincing" standard in denaturalization cases (*Schneiderman v. United States; Nowak v. United States; Chaunt v. United States*, all *supra*), expatriation cases (*Gonzales v. Landon*, 350 U.S. 920; *Nishikawa v. Dulles*, *supra*, at 131), and cases to cancel land patents (*United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381) and pension grants (*Lalone v. United States*, *supra*).

We submit that a higher standard than preponderance of the evidence, preferably the criminal standard, should be required in all deportation cases involving resident aliens who have been admitted into the country for permanent residence. We would not, as does Judge Waterman's opinion, restrict this rule to long-time resident aliens. However, if long residence is a condition, it is met here.

Schneiderman v. United States, *supra*, stated (at 125)

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standard of judicial review and a reminder to the Board that final orders of deportation must be based on substantial evidence." It is also conceivable that the drafters of the Act intended by § 242(b)(4) to limit review by the Board of Immigration Appeals of decisions of special inquiry officers. If so, this intention was obviously a well-kept secret, at least from the Senate Committee, and also from the Board, which habitually makes its independent evaluation of the evidence, as it did here. Cf. the Board's opinion (R. 73-81) with that of the special inquiry officer (R. 66-72).

the rationale for requiring in denaturalization cases a higher standard of persuasion than preponderance of the evidence:

> "This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted."

The same rationale applies to deportation cases against aliens who have been admitted for permanent residence. For such a case seeks to revoke the "once conferred," "precious" right of residency in this country. Unlike *Schneiderman*, the right here has been conferred by administrative, rather than judicial, action. But this makes no difference. *Schneiderman* (at 125) relied upon the *Maxwell Land-Grant Case, supra*, which applied the "clear, unequivocal and convincing" standard in a case seeking to cancel a land patent, and the *Schneiderman* rule was later applied to expatriation cases of persons who acquired their citizenship by birth rather than by naturalization. *Nishikawa v. Dulles, supra.*[4]

In *Rowoldt v. Perfetto*, 355 U.S. 115, and *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, the Court set aside deportation orders for insufficiency of the evidence. It is manifest from the facts of the cases that the Court subjected the records to a more rigorous requirement than preponderance of the evidence. The Court came close to articulating this fact when it referred in *Rowoldt* (at 120),

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[4] Moreover, "Naturalization has become more and more of an administrative proceeding, with the barest possible judicial camouflage." Roche, *Statutory Denaturalization*: 1906-1951, 13 U. Pittsburgh L. Rev. 276, 306.

Nor is the *Schneiderman* rule limited to fraud cases. In *Schneiderman* the government proceeded "not upon the charge of fraud, but upon the charge of illegal procurement" (at 122), and, of course, fraud is not an element of the grounds for expatriation.

to "the solidity of proof that is required for a judgment entailing the consequences of deportation."

There is ample reason, however, for requiring that the standard of proof in deportation cases involving resident aliens should be even higher, namely that which prevails in criminal cases — proof beyond a reasonable doubt. The Court has held that deportation is not "punishment" for constitutional purposes. *Harisiades v. Shaughnessy*, 342 U.S. 580. But realistically deportation of a resident alien is penal in three aspects — its consequences, its grounds, and its procedures.

Deportation is an interference with personal liberty in many respects more drastic than imprisonment. Because of the severity of the consequences, the Court has repeatedly characterized deportation as punishment. "That deportation is a penalty — at times a most serious one — cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391. "To banish them from home, family, and adopted country is punishment of the most drastic kind. . . ." *Lehmann v. United States*, 353 U.S. 685, 691 (concurring opinion). See also *Tan v. Phelan*, 333 U.S. 6, 10; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 533 (dissenting opinion); *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2d Cir.); *United States ex rel. Mignozzi v. Day*, 31 F.2d 1019, 1021 (2d Cir.).

Because of "the grave nature of deportation," the Court has applied to deportation statutes the void-for-vagueness doctrine of criminal cases. *Jordan v. DeGeorge*, 341 U.S. 223, 231. And cf. *Petrowicz v. Holland*, 142 F. Supp. 369, 373 (E.D. Pa.).

Historically, banishment has been regarded as punishment. In the medieval codes, it ranked as a penalty second only to death. Navasky, *Deportation as Punishment*, 27 U. Kansas City L. Rev. 213, 226-27 (1959).

This case illustrates the cruel consequences of deportation of resident aliens. Petitioner entered this country as a child, and has had his home here for 46 years. His family, association and roots are here. His skills, his resources for survival, his ability to communicate in the only language he knows are all dependent on his continued residence here. As Judge Waterman's opinion points out, petitioner faces forcible expulsion to a land "which is in no meaningful sense his country now" (R. 92), and his banishment is "a penalty that surpasses in its enormity many imposed by the criminal law" (R. 91).

The section of the Immigration and Nationality Act which states the grounds of deportation (§ 241, 8 U.S.C. § 1251) reads like an unenlightened penal code. It includes conduct or associations considered to indicate moral turpitude or danger to the state. The claim that deportation is not punitive, but merely a regulatory measure to remove undesirable aliens, is belied by the facts that the causes for deportation include many which have no substantial relationship to undesirability, that they prescribe extreme imputations of guilt by association, and that because of the absence of a statute of limitations they include temporally remote conduct and association. As the President's Commission on Immigration and Naturalization reported, "Deportation may result from trivial offenses; for misbehavior many years after entry into the United States, without any limitation of time; and for wrongful conduct of the remote past, without any consideration as to whether there has been reformation or expiation." *Whom We Shall Welcome, supra,* at 202.

This case also illustrates the penal rather than regulatory nature of the statutory causes of deportation. There is no finding or evidence on petitioner's character or fitness to be a resident of this country. The charge against him arises from the alleged conduct of leaving the country to fight fascism in Spain. The charge was filed twenty-five years after the alleged illegal entry. This charge had been long ago barred by a one-time statute of limita-

tion, which was irrationally and retroactively repealed by the Immigration and Nationality Act (R. 84, fn.).

The section of the Act prescribing deportation procedures (§ 242, 8 U.S.C. § 1252) is like a code of criminal procedure. When a deportation charge is made, the alien may be arrested on administrative warrant. At the Attorney General's discretion, he may be held in custody or allowed bail during the deportation proceeding. His imprisonment or bail may continue for six months after issuance of a final order of deportation. Thereafter, until deportation is effected, the alien must periodically report to the immigration authorities; must submit "if necessary," to medical and psychiatric examination; must give under oath whatever information the Attorney General requires; and must conform to "such reasonable written restrictions on his conduct and activities" as the Attorney General prescribes. The regulations require that the alien be fingerprinted and photographed. 8 C.F.R. § 242.4.

E. The evidence does not support a finding of departability under the correct standard of proof.

If we are correct as to the appropriate standard of proof, it follows that the judgment below must be reversed if only because the administrative agency applied an erroneous principle of law in reaching its decision. *SEC v. Chenery Corp.*, 318 U.S. 80; *SEC v. Chenery Corp.*, 332 U.S. 194.

We submit, however, that the proper course in this case is to order the deportation proceedings terminated rather than to remand for administrative redetermination. This is because the evidence clearly would not support a finding of deportability under either the "beyond a reasonable doubt" standard or the "clear, unequivocal and convincing" standard.

The case against petitioner depends on an uncertain, vague and belated identification by a witness testifying to

casual encounters of 27 years before in a manner inconsistent with his prior statement to a Service investigator. The witness himself admitted that he was not positive and only "felt" he saw petitioner in Spain. His testimony as to where and when he had seen petitioner was unspecific. He had not had any personal contact with petitioner. He could not identify petitioner when originally interviewed. In that interview he thought petitioner may have been with him on the ship leaving the United States, but in his testimony he denied any such recollection and placed petitioner aboard the ship returning to the United States. The witness could not identify the 1937 passport photograph. One must be incredulous of his eventual identification of a person whose appearance had inevitably changed in the intervening 27 years (see R. 46), especially when the identification was made only after the witness took a half hour, in the company of a Service investigator, to observe petitioner. See *supra*, pp. 4-5.

It has elsewhere been remarked of testimony which proposed to go back for twenty years, that the witness "would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection." *United States v. Chase*, 135 F. Supp. 230, 233 (E.D. Ill.). The case here is more extreme than in *Nowak v. United States*, 356 U.S. 660, in which, applying the "clear and convincing" rule for denaturalization, the Court observed (at 667):

> "In addition, the record leaves us with the distinct impression that the testimony as to these episodes was itself quite uncertain, given as it was from 17 to 19 years after the event. Indeed, some of the testimony was elicited only after persistent prodding by counsel for the Government."

The Service's dream-like testimony in this case is not "reasonable, substantial and probative" evidence, nor does it produce the "solidity of proof" demanded by *Rowoldt*. In no event does it satisfy either the criminal standard of proof beyond a reasonable doubt or the standard requiring

that the evidence must be "clear, unequivocal and convincing" to a degree beyond "a bare preponderance of evidence which leaves the issue in doubt."

CONCLUSION

The judgment below should be reversed with directions that the deportation proceedings against petitioner be terminated.

Respectfully submitted,

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